IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN AT JODHPUR

O R D E R

Abbu Bakar & anr. (applicants.) vs. Deen Dayal & anr. (Non-applicants)

S.B.Civil Misc. Application No.33/2004
in
S.B.Civil Regular First Appeal No.59/1998.
Deen Dayal vs. Harjot Kanwar & ors.

Date of Order: 10.7.2006

PRESENT

HON'BLE MR. PRAKASH TATIA, J.

REPORTABLE

Mr. Rajendra Mehta for the applicants.
Mr. R. K. Thanvi and Mr. K.L. Maheshwari for the respondents.

BY THE COURT:

This application under Order 9 Rule 13, C.P.C. has been filed by the applicant Abbu Bakar and Abdul Kayum for setting aside of the judgment and decree passed in S.B.Civil Regular First AppealNo.59/1998, by which the appeal of the plaintiff-respondent Deen Dayal was allowed and this Court decreed the suit for specific performance of the contract in favour of the respondent-plaintiff.

The facts of the case are that the plaintiff-respondent filed suit for specific performance of the contract dated 23.11.1993 by which, according to the plaintiff-defendant no.1 Harjot Kanwar agreed to sell a plot no.102 situated at village Suthla, Chopasani Road, Jodhpur, in Hinglaj Nagar for a consideration of Rs.90,000/- and the plaintiff paid

Rs.5100/- to defendant Harjot Kanwar and an agreement was executed between the parties. Therefore, the plaintiff filed the suit for specific performance of the contract against defendant no.1 alone. From the written statement filed by defendant no.1, the plaintiff came to know that the suit property has been sold to defendant nos.2 and 3 (applicants) by registered sale-deed dated 19.2.1994. The plaintiff, therefore, impleaded subsequent purchasers in the suit as defendant nos.2 and 3. The trial court issued summons of the suit to defendant nos. 2 and 3. There is serious dispute for the address as well as service of summons of the suit upon the defendant. Admittedly the summons of suit were not served personally upon the defendant nos.2 and 3. Since defendant remained absent before the trial court, therefore ex parte order was passed against defendant nos.2 and 3. The suit was contested by the defendant no.1 alone. However, the trial court even then dismissed the suit of the plaintiff-respondent vide judgment and decree dated 29.9.1997.

An appeal was preferred by the plaintiff-respondent before this Court which was registered as S.B.Civil Regular First Appeal No.59/1998. In the appeal, show cause notices were issued to respondents by order dated 6.3.1998. These notices were for final disposal at admission stage and were made returnable within three weeks. The notices were submitted by the plaintiff-respondent in the appeal for the respondents.

Respondent no.1 appeared through his counsel but notices of respondent nos.2 and 3 (defendant nos.2 and 3) were not received back, therefore, the court ordered on 21.4.198 to await notices. Thereafter notice of respondents no. 2 and 3 received unserved, upon which on 20.5.1998, this Court ordered to issue fresh notices to respondent nos.2 and 3 (defendant nos.2 nd 3) by ordinary course as well as by registered post on correct addresses. It appears that notices with fresh addresses for sending by registered post or by ordinary process were not submitted by the appellant and the appellant without even making second attempt to serve the respondents, submitted an application under Order 5 Rule 20,C.P.C., supported by an affidavit on 26.5.1998. In that application, the appellant stated that *despite various efforts, the notices of respondent nos.2 and 3 have not been served. Respondent nos.2 and 3 are intentionally avoiding service of the summon* because they are having the knowledge of this appeal. It is also submitted that respondent nos. 2 and 3 also remained absent before the trial court despite service of summons. *It is also submitted that because of avoiding service by respondent nos.2 and 3, the appeal is being lingered* on and ultimately, the appellant prayed that the appellant may be permitted to serve respondent nos. 2 and 3 by substituted service by publication of notice in news paper.

On this application on 4.7.1998, this Court relying upon the

contention of the appellant, made in the application supported by affidavit and because the application was not opposed by the other respondents, allowed the application and ordered for substituted service of respondent nos.2 and 3 by publication of notice in Rajasthan Patrika, Jodhpur edition. In backdrop of this facts, notices of respondent nos. 2 and 3 were served by publication of the notice in the news paper. On 15.10.1998, the court ordered that service is complete and list the matter for admission. Ultimately, the appeal was allowed by judgment and decree dated 18.3.2002 after hearing counsel for the appellant and counsel for respondent no.1(defendant no.1).

According to the appellant, the service effected by publication of notice in S.B.Civil First appeal No.59/1988 for respondent nos. 2 and 3 (applicants) is no service in the eye of law. It is submitted that this is settled law that the notices are required to be served, personally as far as possible and for that purpose, all efforts should be made first. The substituted service cannot be equivalent to personal service unless before adopting said procedure, efforts are made to serve the process upon the respondents. In this case, once summons were issued and they returned unserved as address was wsrong, upon which the court passed the order to serve the notice upon the respondents applicants on their correct address. The court also ordered to issue notices by ordinary course as well as by registered post but the appellant(non-applicant)

deliberately did not submit the notices even for second time only, which in fact would have been for the first time on fresh addresses. Without making any effort, the appellant submitted application supported by affidavit mentioning therein that " service of respondent nos.2 and 3 despite various efforts have not been effected". This Court was made to believe that various efforts have been made to serve respondent nos.2 and 3 whereas in fact virtually no effort has been made to serve respondent nos.2 and 3 in the S.B.Civil Regular First AppealNo.59/98. It is also submitted that strangely the vendor(respondent no.1) also did not oppose the said application of substituted service, therefore, very foundation for order for substituted service was not there. It is also submitted that the appellant took the same modus operandi before the trial court or the trial court did not apply its mind to the manner in which defendant nos.2 and 3 applicants were shown to have been served with the summons of the suit. Further even in execution of the decree also the plaintiff adopted the same procedure so that applicants who were found bona fide purchasers of the property by the trial court, even in expert decision, may not come to know about the passing of the decree and the decree holder get the sale deed executed through court.

The learned counsel for the applicants vehemently submitted that even reports on summons as well addresses given on the summons where they alleged to have been served, can be looked into to find out

whether there was any bonafide effort to serve the summon of the suit upon defendant nos.2 and 3(applicants) were there or not. The applicants gave detail facts in rejoinder to reply filed by the plaintiff of application under Order 9 Rule 13 C.P.C. about where the summons were sent to whom it is said that summons were offered.

The learned counsel for the applicants submitted that it is not a case of irregularity in service but it is case of no service at all of the notices of this appeal. The learned counsel for the applicants also submitted that the applicants are illiterate and are only *Urdu* knowing persons. They are engaged in the meat business and are unable to read or write Hindi and, therefore, the notices published in the news paper did not came to notice of the applicant. It is also submitted by the applicants that they purchased the suit property by registered sale-deed before the plaintiff filed the suit and since 1994 they have invested further sum of Rs.2,00,000/- over the property and, therefore, there was no reason for them to not to contest the suit. It is also submitted that the appellants-tenants are in occupation of the suit property. The appellants came to know about the judgment passed by this Court when the official from the office of the Sub-Registrar visited the said plot on 20.3.2004. The applicants thereafter submitted this application for setting aside the ex parte decree along with the application for condonation of delay under Section 5 of the Limitation Act.

The respondent-plaintiff submitted reply to the application of the applicants filed under Order 9 Rule 13, C.P.C. According to non-applicant respondent no.1, the suit was filed by plaintiff for specific performance of the contract against defendant no.1-respondent alone as he was not knowing the fact of sale of the suit property by defendant no.1(respondent no.1). When the plaintiff came to know about the sale in favour of defendant nos.2 and 3, he obtained the copy of the registered sale-deed and impleaded defendant nos.2 and 3 as party in the suit. According to the learned counsel for the non-applicant no.1, the plaintiff that defendant nos.2 and 3 applicants avoided service before the trial court as well as before this Court and even before the executing court which is apparent from the record of the above files. It is also submitted that in the trial curt, summon was offered to one of the applicants and he refused to accept the summon of the suit, therefore, he had full knowledge of the suit proceedings and he knowingly did not appear before the trial court. Summon of the another defendant-applicant was offered to his brother who refused to accept the summon of the suit and thereafter the trial proceeded and the suit was dismissed by the trial court against which appellant preferred appeal. In the appeal, the appellant rightly submitted before this Court that the respondent-applicant did not appear before the trial court and they are avoiding the service of the notice issued by this Court. After

recording satisfaction, ordered for substituted service. It is also submitted that substituted service is also service as personal service and it cannot be taken lightly and the judgment and decree cannot be set aside merely on the ground that summons were not personally served upon defendants. It is also submitted that the sale in favour of applicants-defendants is completely void sale and by now, in execution of the decree passed by this Court dated 18.3.2002, the sale-deed has been executed through court and registered in favour of the plaintiff. The appellant-non-applicant also denied any investment made by the applicants over the property in dispute. The non-applicant plaintiff also denied that the applicants came to know about the decree only when the employees of the registration department came to the premises on 20.3.2004. It is also submitted that the trial court proceeded ex parte against Abdul Kayum when summon was offered to his brother who was residing with him, he refused to accept the summon and thereafter summon was affixed on the house of Abdul Kayum and in the same manner, summon of Abbu Bakar applicant was also sent by the court on his actual residence and correct address. Be it as it may be, according to the learned counsel for the respondents there was sufficient service as well as the applicants had full knowledge of the suit as well as this appeal.

The learned counsel for the parties relied upon various judgments

of this Court as well as Hon'ble Apex Court.

The learned counsel for the applicants relied upon Full Bench decision of the Andra Pradesh High Court delivered in the case of G. Shanmukhi v. Utakur Venkatarami Reddi and another (1957 A.P. 1, wherein it has been held that in the case of substituted service under Order 5 Rule 20,C.P.C., there are two conditions prescribed before it can be resorted to viz., that the court must be satisfied either (1) that there is reason to believe that the defendant is keeping out of the way for the purpose of avoiding service or (2) that for any other reason the summons cannot be served in the ordinary way. The Full Bench also observed that the service may or may not be due service as required by Order 9 Rule 13, C.P.C. according to circumstances of the case and it is open to the defendant to establish that he never avoided service and in any case, notice of the claim had not been brought to home to him.

Another judgment relied upon by the learned counsel for the applicants is the judgment of the Madhya Pradesh High Court in the case of M/s Satish Construction Company v. Allahabad Bank (AIR 1990 M.P. 21). The same view has been taken by the Madhya Pradesh High Court as has been taken by the Andra Pradesh High Court in the case of G. Shanmukhi(supra). The learned counsel for the applicants also relied upon the judgment delivered in the case of Smt. Yallawwa v. Smt.Shantavva (AIR 1997 SC 35), wherein Hon'ble the Supreme Court

finding the wife, against whom a decree was passed, illiterate and the service was affected by substituted service by the publication of the notice in news-paper, Hon'ble the Apex Court upheld the order of setting aside the ex parte decree. The learned counsel for the applicants also relied upon the judgment delivered in the case of Shyam Lal and others v. Ramcharan (2001 AIHC 2728). In said case report of process server was received that the defendant refused to accept notice and as such the process server affixed the notice on the wall of the house of the defendant. This Court on finding that no evidence has been produced that any efforts were made by process server to find out the defendant or any other member of the family before affixing said notice on his house, the service is not proper service.

Hon'ble the Apex Court in the case of G.P. Srivastava v. R.K. Raizada and others ((2000) 3 SCC 54) held that “was prevented by any sufficient cause from appearing”-expression must be liberally construed where defence is reasonable, defendant approaches court for setting aside ex parte decree within statutory period and non-appearance is not mala fide or intentional. It is also held that the courts have wide discretion and thus expression must be construed as an elastic expression and no hard and fast guidelines can be prescribed. Hon'ble the Apex Court further held that “sufficient cause” for non-appearance, refers to the date on which the absence was made a ground for

proceeding ex parte and it cannot be stretched to cover circumstances occurring prior to that date.

In the case of C.K. Lokesh vs. P.E. Panduranga Naidu ((1996) 11 SCC 353), Hon'ble the Apex Court observed that in such type of service under Order 5 Rule 20A, the appellant is entitled to file the application within 30 days of knowledge of ex parte decree.

It appears from the judgments referred above as well as from the language used in the Order 5 Rule 20, C.P.C. itself that the substituted service can be ordered when the court is satisfied that there is reason to believe that the defendant is keeping out of the way for the purpose of avoiding service or if the court is satisfied that for any other reason, summons cannot be served in ordinary way. Not only this, it is also clear that the efforts must be made to serve the non-applicant-defendant/respondent personally as far as possible. In present case, it is clear from the record itself that only once notices were sent to the applicants and those notices received back because those notices were not served upon the applicants due to the fact that the process server found the address of the applicants not correct. *Not an even single attempt to serve the notice on correct address has been made by the appellant in this appeal* for the reasons best known to the appellant. Not only this but the appellant even submitted the application in the appeal supported by the affidavit before any effort of service of notice

upon the applicants and specifically mentioned in the application that “that in the above noted appeal, service of respondents no.2 and 3 despite various efforts have not been effected.” The said submission was also made before this Court when appellant's application under Order 5 Rule 20,C.P.C. was considered by this Court and this Court relying upon the appellant's counsel passed the order to serve the respondents by substituted service. Further the appellant in the application under Order 5 Rule 20 C.P.C. mentioned that respondents no.2 and 3 are intentionally avoiding the service of the summons because they are having knowledge about this appeal, but how they got the knowledge of this appeal has not been mentioned in the appeal, particularly in view of the fact that not even once notices of the appeal were sent to the applicants-respondents at their correct addresses. The appellant also submitted in the application as well as before this Court on 4.7.1998 that the respondents remained ex parte before the trial court but as laid down by the Hon'ble Apex Court in the case of G.P. Srivastava(supra), the applicants are supposed to show the sufficient cause for their non-appearance with reference to the date on which absence was made ground for proceeding against them. Hon'ble the Supreme Court held that it cannot be stretched to cover circumstances occurring prior to that date. Though the learned counsel for the applicants pointed out that in fact service was not effected in fact upon

the applicants in the trial court also but this is not very much relevant in view of the decision of the Hon'ble Apex Court in the case of G.P.Srivastava(supra).

It appears that this Court believed the statement of the appellant that several efforts have been made to serve the applicants and that fact is absolutely wrong fact. Other facts mentioned in the application under Order 5 Rule 20,C.P.C. that the respondents no.2 and 3 (applicants) are avoiding service of notices of appeal and "because of avoiding service by the respondents no.2 and 3, the appeal is lingered on", are also absolutely wrong statement of facts. It appears that the Court was misled by the appellant and, therefore, the order of substituted service was passed by the Court. Therefore, this is no service in the eye of law and the decree passed by this court by judgment and decree dated 18.3.2002 is liable to be set aside.

I do not find any force in the submissions of the learned counsel for the respondent-plaintiff that this is case of irregularity in service of the summon and the decree cannot be set aside merely on the ground that there are irregularity in service of summons as held by this Court in the case of M/s Anand Thailee Bhandar v. Ganganagar Sugar Mills Ltd. (1989(2) RLR 94). The learned counsel for the respondent-plaintiff cited the judgment of the Madhya Pradesh High Court delivered in the case of Rameshchandra Rathore vs. Union Bank of India (2001(1) CCC 42 (MP)

but that was a case where the facts like the present case were not there. If the service is effected by publication of notice in the news-paper, by following procedure, the service is sufficient service, but where the service is not effected in accordance with law by publication of notice in news-paper and has been effected without making effort to serve the notices personally upon the defendant/respondent, the service can be challenged by the aggrieved party. In another judgment of this Court relied upon by the learned counsel for the respondent-plaintiff, delivered in the case of Ram Das and another v. Mohan Lal and others (1996(3) Raj. 18), this Court held that in the facts of the said case, the substituted service was the only recourse left open and, therefore, the court after recording satisfaction, ordered substituted service and that service was considered proper, whereas it is clear from the facts of this case that the service upon the applicants-respondents was not service in the eye of law.

At this place, it will be worthwhile to mention here that the applicants purchased the property by registered sale-deed and they are in possession of the suit property actually or through tenants. There appears no reason for these persons for not appearing in appeal, if they would have knowledge of the appeal. Therefore, also in the facts of the case, this Court believes that applicants had no knowledge of the pendency of the appeal and further there is no material on record to

hold that the applicants had knowledge of the pendency of the appeal and mere word of mouth of plaintiff in application under Order 5 Rule 20,C.P.C. that respondents no.2 and 3 had knowledge of the appeal cannot be believed because the appellant gave a wrong affidavit to obtain the order in support of the application under Order 5 Rule 20 C.P.C. Therefore, the application of the applicants filed under Order 9 Rule 13, C.P.C. is within period of limitation from the date of knowledge of decree to the applicants.

In view of the above, the application under Order 9 Rule 13 is allowed and the judgment and decree passed by this Court in S.B.Civil First Appeal No.59/19998 is set aside.

(**PRAKASH TATIA),J.**

mlt.